

IN THE UNITED STATES DISTRICT COURT FOR THE **FILED**
EASTERN DISTRICT OF OKLAHOMA

MAY 8 2009

WILLIAM B. GUTHRIE
Clerk, U.S. District Court

By _____
Deputy Clerk

MICHAEL WAYNE SCHULZE,)

Petitioner,)

v.)

Case No. CIV 09-087-RAW-KEW

JIM KEITH, Warden,)

Respondent.)

OPINION AND ORDER

Both the petitioner and the respondent have filed motions to stay this action, because petitioner has not exhausted the state court remedies for all his claims [Docket #10 and #11]. Petitioner alleges his state post-conviction appeal was dismissed as untimely, and he is asking the court to stay this case until he seeks a post-conviction appeal out of time.

A habeas petitioner is required to exhaust his state court remedies prior to obtaining federal habeas review. *See Magar v. Parker*, 490 F.3d 816, 818 (10th Cir. 2007); *see also* 28 U.S.C. § 2254(b)(1)(A). In *Rhines v. Weber*, 544 U.S. 269 (2005), however, the Supreme Court held that “in limited circumstances,” *id.* at 277, a district court may stay a mixed habeas petition (one that includes both exhausted and unexhausted claims) “to allow the petitioner to present his unexhausted claims to the state court in the first instance, and then to return to federal court for review of his perfected petition,” *id.* at 271-72.

[S]tay and abeyance should be available only in limited circumstances. Because granting a stay effectively excuses a petitioner’s failure to present his claims first to the state courts, stay and abeyance is only appropriate when the district court determines there was good cause for the petitioner’s failure to exhaust his claims first in state court. . . . [T]he stay is limited by the timeliness concerns reflected in AEDPA. A mixed petition should not be


stayed indefinitely.

Id. at 277.

Here, petitioner has not advised the court of why he failed to file a timely post-conviction appeal, and according to the Oklahoma State Courts Network at www.oscn.net, he has not yet initiated an application for an out-of-time post-conviction appeal. Furthermore, he has failed to advise the court of when he intends to do so. The court, therefore, finds petitioner has failed to meet the requirements imposed by *Rhines* for granting a stay.

ACCORDINGLY, petitioner's and respondent's motions to stay [Docket #10 and #11] are DENIED.

IT IS SO ORDERED this 8th day of May 2009.


RONALD A. WHITE
UNITED STATES DISTRICT JUDGE